Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

In the

SUPREME COURT OF THE UNITED STATES

Brian Hilvety

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for
the District of Columbia Circuit

WRIT OF CERTIORARI

Brian Hilvety, *pro-se*
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Moweaqua, Illinois 62550
217-825-9418

QUESTIONS PRESENTED

1. Whether the decision by the United States Court of Appeals for the District of Columbia Circuit to transfer jurisdiction over a Tax Court decision appealed to it from an Order entered out of Washington D.C. United States Tax Court under the circumstances of this case was contrary to 26 U.S.C. § 7482(b)(1)?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties in the case below.

TABLE OF CONTENTS

OPINIONS BELOW.....1

STATEMENT OF JURISDICTION.....2

CONSTITUTIONAL AND STATUTORY PROVISIONS.....2

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING WRIT TO CIRCUIT.....5

1.

26 U.S.C. § 7482(b)(1) proscribes the only "United States Court of Appeals" to which "exclusive jurisdiction" to review "decisions of the Tax Court" would be the District of Columbia Circuit "if for any reason no subparagraph of the preceding sentence applies.".....5

CONCLUSION.....12

APPENDIX

Appendix A– Decision by Tax Court.....App.1

Appendix B – Order of United States Court of Appeals for the District of Columbia Circuit App.3

Appendix C – Order Denying Petitioner for Rehearing..App.5

Appendix D – Order Denying Petition for Rehearing En Banc.....App.6

TABLE OF AUTHORITIES

ASA *Investerings P'ship v. Commissioner*, 201 F.3d 505, 511 (D.C. Cir.), cert. denied, 121 S.Ct. 171 (2000).....6

Bryan v. U.S., 524 U.S. 184, 194 (1998).....8

Cheek v. U.S., 498 U.S. 192, 206 (1991).....7,8

Commissioner v. McCoy v. McCOY, 484 U.S. 3,6 (1987)....7,8

Del Commercial Prop v. Commissioner SER, 251 F.3d 210, 213 (D.C. Cir. 2001) 6

Estate of Israel v. Commissioner of I.R.S., 159 F.3d 593, 595 (D.C. Cir. 1998).....9

PETITION FOR WRIT OF CERTIORARI

Petitioner, Brian Hilvety respectfully requests that a writ of certiorari be issued to review the judgment and order of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The Decision of the Tax Court dated August 8, 2003.

The Order by Justices Ginsberg, Chief Judge, and Justices Henderson and Tatel, Circuit Judges, was issued on December 17, 2003.

The Order to deny rehearing by the original panel was issued March 1, 2004.

The Order denying rehearing en banc was also reported March 1, 2004.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was finally determined on March 1, 2004.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

26 U.S.C. § 7482(b)(1)

"If for any reason no subparagraph of the preceding sentence applies, then such decision may be reviewed by the court of Appeals for the District of Columbia."

STATEMENT OF THE CASE

The Commission of the Internal Revenue filed a Notice of Deficiency with Petitioner. Petitioner timely filed a Petition with the Tax Court in January, 2002. The primary issue raised in the Petition was that the Commissioner claimed a penalty should be imposed on the willful failure to file a tax return that Petitioner admitted was not filed.

Petitioner claimed that since the Notice of Deficiency failed to identify the statute which the Commissioner based imposition of the penalty under 26 U.S.C. § 6651(a), the penalty should not be imposed. Petitioner argued that the penalty under 26 U.S.C. § 6651(a)(2) should likewise not be imposed to which the Tax Court agreed with Petitioner and denied the imposition of the penalty imposed pursuant to 26 U.S.C. § 6651(a)(2).

Petitioner also claimed that unless the Commission identifies the specific section under its authority to which the claimed deficiency is based, the Notice of Deficiency was deficient and should be denied.

The Tax Court then claimed Petitioner made a frivolous argument and imposed a $ 500.00 penalty claiming that demanding to have "notice" of the statute and regulation promulgated therein in support of the deficiency and penalty fo

failure to file a return was frivolous.

Petitioner appealed to the United States Court of Appeals for the District of Columbia wherein that Court transferred Petitioner's case to the United States Court of Appeals for the Seventh Circuit after being notified by the Commissioner that the Seventh Circuit would not entertain Petitioner's appeal until a sanction to that Court had been paid in full by Petitioner.

Subsequently, on January 15, 2004, the Seventh Circuit dismissed Petitioner's case therein transferred to it by the D.C. Circuit Court. On January 29, 2004, Petitioner filed a Petition for Rehearing with the U.S.C.A. for the D.C. Circuit as well as a Petition for Rehearing En Banc on the issue of transferring Jurisdiction to the Seventh Circuit Court.

On March 1, 2004, the three Judge panel and the entire U.S.C.A. for the D.C. Circuit Judges in active service denied both the Petition for Rehearing and Petition for Rehearing En Banc.

This appeal follows.

REASONS FOR GRANTING WRIT.

THE PETITION SHOULD BE GRANTED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECISION WAS IN COMPLETE OPPOSITION TO 26 U.S.C. § 7482(b)(1).

1. 26 U.S.C. § 7482(b)(1) proscribes the only "United States Court of Appeals" to which "exclusive jurisdiction" to review "decisions of the Tax Court" would be the District of Columbia Circuit "if for any reason no subparagraph of the preceding sentence applies."

The Internal Revenue Code provides that once a "decision" has been entered by the Tax Court, the United States Court of Appeals has "exclusive jurisdiction" to review the decisions "of the Tax Court..."

Under 26 U.S.C. § 7482(b)(1) "venue" is the "circuit in which is located" "in the case of a petitioner seeking redetermination of tax liability....the legal residence of the petitioner."

Tax Court decisions are to be reviewed "in the same

manner and to the same extent" as a decision issued by a district court. 26 U.S.C. § 7482. Questions of law are reviewed de novo. See ASA *Investerings P'ship v. Commissioner*, 201 F.3d 505, 511 (D.C. Cir.), cert. denied, 121 S.Ct. 171 (2000). *Del Commercial Prop v. Commissioner SER*, 251 F.3d 210, 213 (D.C. Cir. 2001) The District Court in this Case arises out of Washington D.C.

On December 12, 2001, the United States Court of Appeals for the Seventh Circuit entered a Order for sanctions payable to the Seventh Circuit directly against Petitioner which directed no document may be filed by any Court Clerk in any District Court within the Seventh Circuit or in the Seventh Circuit containing the name of Brian Hilvety until such sanctions were paid. The Seventh Circuit determined after this case was "transferred" by the District of Columbia Circuit to it that the sanctions have not been paid to it and therefore the Motion to Dismiss filed by the Government was "GRANTED."

If the Seventh Circuit Court Order had applied to the Tax Court then Tax Court would have simply denied the docketing of Petitioner's request for "redetermination" as that word appears in 26 U.S.C. §§ 7482 and 6213. Clearly, the Tax Court did docket the Petition by Petitioner triggered by the filing of a purported Notice of Deficiency to which was deficient within its

purported "Notice." It did not contain the specific provisions of the Internal Revenue Code to which it was based, either for the increase in tax claim or the failure to file penalty. Petitioner was the Petitioner but the action was not "began" by Petitioner. It began with the Notice of Deficiency.

In the *Cheek* decision, this Court held that, "without paying the tax, he could have challenged claims of tax deficiencies in the Tax Court, § 6213, with the right to appeal to a higher court if unsuccessful. § 7482(a)(1). Cheek took neither course in some years, and, when he did, was unwilling to accept the outcome. *Cheek v. U.S.*, 498 U.S. 192, 206 (1991)

Petitioner claims that since the Tax Court was allowed to consider his Petition docketed with the Tax Court by its Clerk and that since neither the Government nor the Tax Court relied upon the Order of the Seventh Circuit to determine the issue Petitioner raised, that when the Tax Court issued that order, their decision was to be reviewed according to 26 U.S.C. § 7482.

"It follows that in reviewing a Tax Court decision, the duty of the court of appeals is to consider whether the Tax Court committed error. Plainly, the court of *appeals lacks jurisdiction to decide an issue that was not the subject of the Tax Court proceeding* or to grant relief that is beyond the powers of the Tax Court itself. *Commissioner v. McCoy v. McCOY*, 484 U.S. 3,6

(1987)

On appeal the Government moved to dismiss the appeal as frivolous or transfer venue to the Seventh Circuit. The District of Columbia Circuit granted the transfer part of the Motion and denied as "moot" the Motion to Dismiss the appeal as frivolous.

Petitioner simply seeks to ascertain why the Commissioner of the Internal Revenue must cite in their Notice of Deficiency the specific provisions of the Internal Revenue Code to support the interest and penalty provisions based upon the proposed increase in tax, yet do not have to cite the specific provisions authorizing the "increase in tax" portion. Likewise, if the penalty for willful failure to file is to be sought, shouldn't the provision that required the "information request form" be identified in the "Statutory Notice of Deficiency?" Interestingly, the interest and penalty provisions are based upon the increase in tax purported deficiency.

In certain cases "involving willful violations of the tax laws, we have concluded that the jury must find that the defendant was aware of the specific provision of the tax code that he was charged with violating." *Bryan v. U.S.*, 524 U.S. 184, 194 (1998); quoting *Cheek v. United States*, 498 U.S. 192, 201 (1991)

How can it be that deprivation of liberty requires notice of the specific provisions at issue but deprivation of property is held to a "no notice" standard?

In opposing the Motion to Transfer Venue and Motion to Dismiss, Petitioner directed the U.S.C.A. for the District of Columbia Circuit panel that this was a case of first impression. Yet, the D.C. Circuit simply without any explanation granted the government's Motion to Transfer Venue to the Seventh Circuit.

26 U.S.C. § 7482(b)(1) clearly says that "if for any reason no subparagraph of the preceding sentence applies, then such decisions may be reviewed by the Court of Appeals for the District of Columbia."

The Order of December 12, 2001, by the Seventh Circuit clearly makes no other provision under 26 U.S.C. § 7482(b) applicable to the decision entered by the Tax Court in Washington D.C.

This provision under section 7482(b)(1) is known as the "default provision." In other words, a person's status "as a Tax Court petitioner residing outside of any judicial circuit makes venue proper here, regardless of the status of any other appellant. This is consistent with one of the rationales generally underlying venue statutes - the convenience of the litigants." *Estate of Israel v. Commissioner of I.R.S.*, 159 F.3d 593, 595 (D.C. Cir.

1998)

Petitioner realizes that because the Seventh Circuit sanctions Petitioner that this may be a deciding factor in either of the 9 Justices considering this Petition under Rule 16 of the Rules of the Supreme Court for review in deciding whether to grant Certiorari. Petitioner objects to the Seventh Circuit sanctions because it was solely entered because the Seventh Circuit did not wish to address the issues raised for the first time by Appellant in that case. It was also a case of first impression.

In that case, the issue was whether withholding tax a year in advance of a tax being owed could be taken out of the pay check of Petitioner without either his agreement to allow withholding under 26 U.S.C. § 3402(p)(3) or any other due process prior to this deprivation of property. Citing no case law to disagree with Petitioner, the sanctions followed.

Petitioner also understands that forcing the I.R.S, including its Commissioner or anyone acting under its authority, to comply with specific code provisions in the Internal Revenue Code, may be a very unpopular decision considering the current environment America is in.

It is the "rule of law" that has brought us to this place and it seems logical that affirming that position would only affirm are commitment that Government Employees, no matter how high

up they are, must act according to laws written by Congress that the whole world can understand.

This Case involves the Commissioner refusing to comply with the "statutory notice of deficiency" provision. It next goes to the United States Tax Court which refused to address the deficiency claimed by Petitioner and even imposed a $ 500.00 sanction for asking the Commissioner to be forced to comply with the Internal Revenue Code. It involves the United States Court of Appeals for the District of Columbia refusing to comply with 26 U.S.C. § 7482(b)(1). It involves the Seventh Circuit refusing to address how money can be taken from a paycheck by the I.R.S., without any agreement by Petitioner to allow such, 1 year in advance of when the I.R.S. claims the tax would even be owed.

Petitioner believes this Case involves a important question of law and whether any employee of the United States, including but not limited to I.R.S. Commissioner and their delegates, Tax Court and United States Court of Appeals Judges, are required to recognize and comply with all applicable provisions of the Internal Revenue Code or may they simply ignore it because to do otherwise would direct attention to flagrant disregard for its specific provisions.

CONCLUSION

For the reasons stated herein, Petitioner respectfully request this Court issue a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit reversing its decision to transfer venue to the Seventh Circuit.

Respectfully Submitted

Brian Hilvety

UNITED STATES TAX COURT

Brian Hilvety

v. Docket No. 2568-02

C.I.R.

DECISION

Pursuant to the opinion of the Court filed April 28, 2003, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED AND DECIDED: that there is a deficiency in income tax due from the petitioner for the taxable year 1997 in the amount of $ 3,088.00;

That there is an addition to tax due from the petitioner for the taxable year 1997, under the provisions of I.R.C. § 6651(a)(10, in the amount of $ 771.50;

That there is an addition to tax from the petitioner for the taxable year 1997, under the provisions of I.R.C. § 6654, in the amount of $ 166.23;

That there is no addition to tax from the petitioner for taxable year 1997, under the provisions of I.R.C. § 6651(a)(2);

That there is a penalty due from the petitioner for the

taxable year 1997, under the provisions of I.R.C. § 6673(a)(1) in the amount of $ 500.00.

Signed Carolyn P. Chiachi

Judge

Entered August 8, 2003

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 03-1243 September Term, 2003

Brian Hilvety

v. Filed on Dec. 17, 2003
Clerk

C.I.R.

Before: Ginsberg, Chief Judge, and Henderson and Tatel, Circuit Judges

ORDER

Upon consideration of the motion to dismiss as frivolous or to transfer to United States Court of Appeals for the Seventh Circuit, and the response thereto, it is

ORDERED that the motion to transfer to United States Court of Appeals for the Seventh Circuit be granted. It is

FURTHER ORDERED that the motion to dismiss be dismissed as moot.

The clerk is directed to send a certified copy of this order and the original files to the United States Court of Appeals for the Seventh Circuit. Pursuant to D.C. Circuit Rule 36, this

disposition will not be published.

Per Curiam

Three sets of initials cannot make out.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 03-1243 September Term, 2003

Brian Hilvety

v. Filed on March 1, 2004
Clerk

C.I.R.

Before: Ginsberg, Chief Judge, and Henderson and Tatel, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed February 2, 2004, it is

ORDERED that the petition be denied.

Per Curiam

For the Court
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 03-1243 September Term, 2003

Brian Hilvety

v.

Filed on March 1, 2004
Clerk

C.I.R.

Before: Ginsberg, Chief Judge, Edwards, Sentelle, Henderson, Randolph,* Rogers, Tatel, Garland, and Roberts, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

For the Court
Michael C. McGrail
Deputy Clerk

* Circuit Judge Randolph did not participate in this matter.

(2)

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Respondent.

On Petition for Writ of Certiorari
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SUPPLEMENTAL APPENDIX

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TABLE OF CONTENTS

Tax Court Memo. 4-28-03.....1

T.C. Memo. 2003-119

UNITED STATES TAX COURT

BRIAN HILVETY, Petitioner v.
CIR. Respondent

Docket No. 2568-02. Filed April 28, 2003

Brian Hilvety, pro se.

Kathleen C. Schlenzig, for respondent.

MEMORANDUM OPINION

CHIECHI, Judge: Respondent determined the following deficiency in, and addition to, petitioner's Federal income tax (tax):[1]

		Addition to tax		
Year	Deficiency	Sec. 6651(a)(1)[2]	6651(a)(2)	6654(a)
1997	$ 3,000.00	$ 694.35	$ 570.91	$ 166.23

[1]Respondent also determined interest on the amounts of those items as provided by law.

[2]All section references are to the Internal Revenue Code in effect for the year at issue. All Rule references are to the Tax Court Rules of Practice and Procedure.

The issues remain for decision are: [3]

(1) Does petitioner have unreported wage income for his taxable year 1997? We hold that he does.

(2) Is petitioner liable for his taxable year 1997 for an addition to tax under section 6651(a)91)? We hold that he is.

(3) Is petitioner liable for his taxable year 1997 for an addition to tax under section 6654(a)? We hold that he is.

BACKGROUND

Some of the facts have been stipulated and are so found. Petitioner had a mailing address in Moweaqua, Illinois, at the time he filed the petition.

During 1997, RWP Enterprises, Inc., d/b/a Rat's Whole Place, paid petitioner wages of $ 11, 130. That company

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[3]Respondent concedes that petition is not liable for his taxable year 1997 for an addition to tax under sec. 6651(a)(2) - Respondent conceded in the parties stipulation of facts that petitioner had prepaid credits in excess of those determined in the notice of deficiency (notice) issued to him for that year.

withheld from those wages FICA tax and Medicare tax of $ 690 and $ 161, respectively.

During 1997, Trading Specialties International, Inc., paid petitioner wages of $ 15,522. That company withheld from those wages Federal income tax, FICA tax, Medicare tax of $ 2, $ 962, $ 225, respectively.

During 1997, petitioner did not make any estimated tax payments to the Internal Revenue Service.

Petitioner did not file a tax return for his taxable year 1997.

On January 31, 2002, petitioner filed the petition in this case. The petition contains allegations, contentions, arguments and questions that the Court finds to be frivolous and/or groundless.

On March 7, 2003, respondent submitted respondent's trial memorandum in this case. Attached to respondent's trial memorandum was a copy of a draft of a stipulation of facts proposed by petitioner (petitioner's proposed stipulation of facts)

as well as petitioner's cover letter dated February 28, 2003, transmitting such proposed stipulation of facts to respondent's counsel (petitioner's February 28, 2003 transmittal letter).

In an Order dated March 10, 2003 (March 10, 2003 Order), the Court ordered respondent's trial memorandum, including the attachments thereto, to be filed as of the date of receipt by the Court. In that Order, the Court found that certain statements and arguments set forth in petitioner's proposed stipulation of facts and petitioner's February 28, 2003 transmittal letter are frivolous and/or groundless. In the March 10, 2003 Order, the Court reminded petitioner about sectino 6673(a) and admonished his that, in the event he continued to advance frivolous and/or groundless contentions and arguments, the Court would be inclined to impose a penalty not in excess of $ 25,000 on him under section 6673(a)(1).

On March 10, 2003, petitioner submitted petitioner's trial memorandum to the Court. In an Order dated March 11, 2003 (March 11, 2003 Order), the Court ordered petitioner's trial

memorandum to be filed as of the date of receipt by the Court. In that Order, the Court found that petitioner's trial memorandum set fourth issues, statements, contentions, and arguments that are frivolous and groundless. In the Court's March 11, 2003 Order, the Court reminded petitioner about its March 10, 2003 Order and issue a second reminder to petitioner about section 6673(a) and a second admonition to him that, in the event he continued to advance frivolous and/or groundless statements, contentions, and arguments, the Court would be inclined to impose a penalty not in excess of $ 25,000 on him under section 6673(a)(1).

On March 24, 2003, at the call of this case from the calender (calender call) at the Court's trial session in Chicago, Illinois, the Court again reminded petitioner that, in the event he advanced frivolous and/or groundless contentions and arguments at trial, the Court would impose a penalty on him under section 6673(a)(1). The Court also advised petitioner at the calender call that, in the event he advanced such types of contentions and arguments at trial, as opposed to presenting facts that are relevant

to resolving the issues remaining in the instant case, the Court would probably not allow him to testify about such frivolous and/or groundless contentions and arguments.

On March 24, 2003, this case was called for trial. Petitioner was the only witness. The following colloquy took place between the Court and petitioner during petitioner's testimony:

THE COURT: *** Mr. Hilvety, you may now testify to any facts that are relevant to resolving the determinations in the notice of deficiency that remain at issue in this case.

THE WITNESS: Well, the fact is that the notice of deficiency is deficient on its face because it has no section listed for the deficiency.

THE COURT: That's a legal argument. I want any facts that you want to testify to that *** (are) relevant to resolving the

issues that remain in this case.

THE WITNESS: Well, the Internal Revenue Service is required to state what the tax is derived from under section 62—.

THE COURT: That's an argument, and it's a frivolous argument, and I told you this morning and I'll tell you now. I'll give you one more chance, and unless you're going to start testifying to facts that are relevant to resolving the issues in this case as opposed to making frivolous and/or groundless contentions and arguments, you will be excused from testifying altogether, and I will entertain a motion to dismiss for failure to properly prosecute this case.

Do you understand what I'm saying to you?

THE WITNESS: Yes I do.

THE COURT: Okay, Now, what facts that are relevant to resolving the issues that remain in this case do you want to testify about?

THE WITNESS: In light *** (of) what you've just said, I have nothing else.

On cross examination, the following dialogue took place between respondent's counsel and petitioner:

Q. Mr Hilvety, you did not file a tax return for taxable year 1997, did you?

A. I could not find in the Internal Revenue Code anywhere where I was required by law, written by Congress, to file a return.

Q. Sir, did you or did you not file a tax return for 1997?

THE WITNESS: No, I did not.

The Court did not order any post trial briefs in this case. Nonetheless, on March 26, 2003, petitioner submitted to the Court a document that the Court had filed as petitioner's supplement to petitioner's trial memorandum (petitioner's supplement). Petitioner's supplement contains questions, statements, contentions, and arguments that the Court finds to be frivolous and/or groundless. Petitioner's supplement also argues for the first time that respondent mailed the notice to him with respect to his taxable year 1997 after the period of limitations prescribed by section 6501 for that year had expired.

DISCUSSION

Petitioner has introduced no credible evidence with respect to any factual issue relevant to ascertaining whether the determination in the notice if erroneous. We find that petitioner

has the burden of proving that those determinations are wrong. Rule 142(a); Welch v. Helvering, 290 U.S. 111, 115 (1933); sec 7491(a).

Petitioner proffered no evidence and advanced no argument establishing that respondent's determination that he had wage income for 1997 totaling $ 26,690 is in error. Indeed, petitioner concedes in the parties stipulation of facts in this case that he had that amount of wage income for that year.

Nor has petitioner proffered any evidence or advanced any argument establishing that respondent is wrong in determining that he is liable fo his taxable year 1997 for additions to tax under sections 66519a)(10 and 6654(a).[4]

We now turn to section 6673(a)(1), a provision that the court brought to petitioner's attention several times both before

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[4]Petitioner concedes on cross examination at trial and in petitioner's supplement to petitioner's trial memorandum that he did not file a return for his taxable year 1997. We conclude that respondent has satisfied respondent's burden of production under sec. 7491(c).

and during the trial in this case. The Court specifically advised petitioner before and during trial that the questions, statements, contentions, and arguments that he was advancing in his trial memorandum and that he attempted to advance at trial were frivolous and/or groundless. Moreover, the Court reminded petitioner before and during trial about section 6673(a)(1) and admonished him that, in the event he continued to make frivolous and/or groundless statements, contentions, and arguments, the Court would be inclined to impose a penalty on him under that section. Nonetheless, petitioner persisted throughout the course of the proceedings in this case in advancing frivolous and/or groundless questions, statements, contentions, and arguments.

Section 6673(a)(1) authorizes the Court to impose a penalty in favor of the United States in an amount not to exceed $ 25,000 whenever it appears that a taxpayer's position in a proceeding is frivolous and/or groundless or that the taxpayer institutes or maintains a proceeding in the Court primarily for delay.

On the instant record, we find that petitioner's position in this case is frivolous and/or groundless[5] and that he instituted and maintained this proceeding primarily for delay. Accordingly, we shall impose a penalty on petitioner under section 6673(a)(1) in the amount of $ 500.

We have considered all of petitioner's contentions, arguments, and requests that are not discussed herein, and we find them to be without merit and/or irrelevant.

To reflect the foregoing and respondent's concession,

Decision will be entered under Rule 155

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[5]Although no pled in the petition, petitioner argues for the first time in petitioner's supplement to petitioner's trial memorandum that the period of limitations under section 6501 with respect to his taxable year 1997 has expired. That argument is groundless. Petitioner did not file a tax return for 1997. We hold that the period of limitations for that year has not expired. Sec. 6501(c)(3).